

0138B

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

WEYERHAEUSER COMPANY,

Appellant,

and

WIDCO WASTE SERVICES, INC.,

Intervenor-Appellant.

v.

COWLITZ-WAHKIAKUM HEALTH
DISTRICT,

Respondent,

and

STATE OF WASHINGTON DEPARTMENT
OF ECOLOGY; PATRICK C. WILKINS;
CHESTER GARDNER; STANLEY
DAHLQUIST; MARTHA M. BELDING
and DONALD E. BELDING; ELAINE
SCHREINER; LOIS P. COOPER; GAIL
ROBINSON; JACK KERSTETER; VICKI
MERCER; REGINA COSTA; FRANCINE
OLDS; and KEN HENDERSON;

Intervenor-Respondents.

and

THURSTON COUNTY,

Amicus Curae.

PCHB No. 90-165

FINDINGS OF FACT, CONCLUSIONS
OF LAW and ORDER ON SUMMARY
JUDGMENT

Weyerhaeuser Company filed an appeal with the Pollution Control
Hearings Board contesting Cowlitz-Wahkiakum Health District's denial
of solid waste permits under Chapt. 70.95 RCW.

ORDER ON SUMMARY JUDGMENT
PCHB No. 90-165

(1)

1 A conference was held on October 8, 1991 with the two parties and
2 the State of Washington Department of Ecology ("DOE"). During the
3 conference the Department moved for intervention as a respondent,
4 which was granted (Order, October 16, 1990). On October 8, 1990, as a
5 result of the conference, a schedule for summary judgment motion
6 practice issued. On October 29, 1990 intervention was granted to
7 Patrick C. Wilkins as a respondent on the condition that he take the
8 summary judgment schedule as it existed. On November 2, 1990 in
9 conformance with the schedule, stipulated facts were filed with the
10 Board. They were signed by appellant Weyerhaeuser and respondents
11 Health District and DOE. On November 7, 1990 intervention was granted
12 to Chester Gardner, Stanley Dahlquist, and Martha M. and Donald E.
13 Belding, as respondents, provided they took the summary judgement
14 schedule as it existed. On November 19, 1991 the Board granted
15 intervention to Widco Waste Services, Inc. as an appellant, to nine
16 more individuals as respondents, and amicus curae status to Thurston
17 County.

18 Oral argument was held on December 3, 1990. Appearances were as
19 follows:

20 Weyerhaeuser by Attorney John Phillips;
21 Widco by Attorney Alexander W. Mackie;
22 Cowlitz-Wahkiakum Health District by Attorney Pat Brock;
23 Department of Ecology by Assistant Attorney General Jay J.
24 Manning;

1 Chester Gardner for himself;

2 Vicki Mercer for herself;

3 Regina Costa for herself;

4 Remaining individual respondents by Attorney David Bricklin;

5 Amicus Curae Thurston County by Senior Deputy Prosecuting

6 Attorney Thomas Bjorgen.

7 The proceedings were taken by a Court Reporter affiliated with
8 Gene S. Barker & Associates (Olympia).

9 The Board has considered the following filings in this summary
10 judgment proceeding:

| 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 |
|----|---------------------------------|--|------------|----|----|----|----|----|----|----|----|----|----|----|----|
| | Filed by | Name of Document | Date filed | | | | | | | | | | | | |
| | Weyerhaeuser | Notice of Appeal and attachments | 9/18/90 | | | | | | | | | | | | |
| | Weyerhaeuser | Motion for Summary Judgment, Brief and attachments | 11/2/90 | | | | | | | | | | | | |
| | Weyerh./Health Dist. and DOE | Stipulated Facts | 11/2/90 | | | | | | | | | | | | |
| | Weyerhaeuser | Table of Authorities for S/J Motion | 11/6/90 | | | | | | | | | | | | |
| | WIDCO | Memorandum in Support of Motion for S/J, and attachments | 11/7/90 | | | | | | | | | | | | |
| | Chester Gardner | Intervenor's Brief | 11/14/90 | | | | | | | | | | | | |
| | Martha M. Belding | Intervenor's Brief w/attachment | 11/16/90 | | | | | | | | | | | | |
| | Patrick C. Wilkins | Brief in Opposition to Weyerhaeuser's S/J Motion, and attachments | 11/16/90 | | | | | | | | | | | | |
| | DOE | Motion for Summary Judgment and attachments | 11/16/90 | | | | | | | | | | | | |

| 1 | Filed by | Name of Document | Date filed |
|----|---------------------------|--|------------|
| 2 | Thurston County | Amicus Curiae Brief | 11/16/90 |
| 3 | Cowlitz-Wahkiakum | Motion for Summary Judgment ("S/J") | |
| 4 | Health District | and attachments | 11/16/90 |
| 5 | DOE | Additional Authorities | 11/19/90 |
| 6 | DOE | Attachments to Authorities | 11/20/90 |
| 7 | Weyerhaeuser | Reply Brief (FAX copy) | 11/21/90 |
| 8 | | (Original) | 11/26/90 |
| 9 | Chester Gardner | Reply Brief to WIDCO Findings of Fact | 11/26/90 |
| 10 | Stanley Dahlquist | Brief in Opposition to Weyerhaeuser's S/J | |
| 11 | | and attachments | 11/26/90 |
| 12 | Chester Gardner | Letter re Question of Law | 11/27/90 |
| 13 | Don Belding | Brief in Opposition to Weyerhaeuser's Motion | |
| 14 | | for Summary Judgment and attachments | 11/27/90 |
| 15 | WIDCO | Reply Brief and attachments | 11/27/90 |
| 16 | Gail Robinson | Letter in Rebuttal to Weyerhaeuser | 11/26/90 |
| 17 | | and WIDCO S/J | (dated) |
| 18 | Francine Olds | Brief Opposing Weyerhaeuser's Motion for | |
| 19 | | Summary Judgment, and attachments | 11/28/90 |
| 20 | Jack Kersteter | Letter in Rebuttal to Weyerhaeuser and | |
| 21 | | WIDCO's S/J, and attachments | 11/30/90 |
| 22 | Vicki Mercer | Memorandum in Support of S/J | 11/30/90 |
| 23 | Regina Costa | Brief Opposing Weyerhaeuser's S/J, | |
| 24 | | and attachments | 12/3/90 |
| 25 | Weyerhaeuser | Supplemental Brief in Response to | |
| 26 | | Respondent/Intervenors' Post-Reply | |
| 27 | | Briefs, and attachments | 12/7/90 |
| 28 | ORDER ON SUMMARY JUDGMENT | | |
| 29 | PCHB No. 90-165 (4) | | |

| Filed by | Name of Document | Date filed |
|-----------------|---|----------------------|
| WIDCO | Reply Brief to Mercer and Costa | 12/7/90 |
| Wilkins, et al. | Memorandum in Support of Intervenors' Motion Regarding "Lapsed Plans" (FAX copy) (Original) | 12/10/90 12/11/90 |
| Chester Gardner | Issue of Law | 12/14/90 |
| Thurston County | Reply Brief | 12/14/90 |
| WIDCO | Reply to Citizen Intervenors on "Lapsed Plan" | 12/17/90 |
| Weyerhaeuser | Memorandum in Response to Intervenors' Motion Regarding "Lapsed Plan" (FAX copy) (Original) | 12/17/90 12/21/90 |
| WIDCO | Reply to Citizens on the Continuing Viability of Comprehensive Solid Waste Management Plans | 12/17/90 |
| Weyerhaeuser | Memorandum in Response to Intervenor Gardner's "Issue of Law" (FAX copy) (Original) | 12/18/90 12/21/90 |

Having considered the foregoing, the Board issues these:

FINDINGS OF FACT

I

Weyerhaeuser is a large forest products company that does business in the State of Washington. It has wood products processing facilities in the City of Longview, and timber land in Cowlitz County, Washington.

II

The Cowlitz-Wahkiakum Health District ("District") is the local

1 authority responsible for issuing solid waste handling permits
2 ("permits") for facilities located in either Cowlitz or Wahkiakum
3 County. The District has the responsibility, in the first instance,
4 to determine whether permit applications conform with the Approved
5 Comprehensive Solid Waste Handling Plan ("Plan"). RCW 70.95.180(3)
6 and (4).

7 The State of Washington Department of Ecology ("DOE") is also
8 responsible for subsequently reviewing permit applications to
9 determine conformance. RCW 70.95.185.

10 II

11 Weyerhaeuser's Longview facilities generate wood product-related
12 solid waste, consisting primarily of wood waste, industrial waste,
13 demolition and landclearing debris, wastewater treatment solids, lime
14 wastes, and boiler ash. The company expects this waste stream to
15 increase in net volume.

16 For about the past 10 years Weyerhaeuser has disposed of its
17 nonhazardous Longview solid waste at the Radakovich Landfill in
18 Cowlitz County. (The name of the landfill has been changed to the Mt.
19 Solo Landfill.) The landfill, which has also received others wastes,
20 is nearing capacity. At the time of the filings in this case, the
21 Landfill was closed, awaiting a variance from State Minimum Functional
22 Standards so as to be able to dispose of wastes vertically until
23 maximum grade is reached.

IV

Weyerhaeuser has proposed a landfill to be located on 380 acres of its property, one mile east of its Headquarters Camp, in Cowlitz County. The site is at the end of South Silver Lake Road, some miles south of Silver Lake. The Company proposes to dispose of 500,000 tons of waste yearly. The landfill site has an estimated capacity of 55,000,000 cubic yards, providing an estimated life of 30 to 60 years.

Weyerhaeuser proposes to dispose of nonhazardous wastes from its own operations in Western Washington, as well as nonhazardous wood products wastes from other large generators. It will also consider contracting with Cowlitz County to accept demolition, and construction debris and other wood wastes previously accepted at the Radakovich Landfill. Weyerhaeuser estimates the composition of the wastes will be: 15% wood waste, 10% ash, 15% inert wastes (concrete rocks, soil, sand, etc.), 10% construction or demolition wastes, and 50% industrial wastes (i.e. dewatered effluent treatment solids).

Under Cowlitz County's Comprehensive Plan, the area is designated Forestry-Open Space. There is no zoning for the site.

V

The Company also proposes to construct and operate a Materials Recovery and Transfer facility in Longview, Cowlitz County. It would be 10 acres or less in size. The site is currently zoned Industrial-Heavy Manufacturing.

1 VI

2 The proposed landfill site is currently in active timber
3 production. The landfill would likely result in the clearing of about
4 365 acres of upland second growth forest, the filling of 15 acres of
5 forested wetland, and the re-routing of an unnamed creek. The
6 facility is proposed to operate in 20 to 30 acre increments which
7 would be excavated as needed.

8 The waste would be loaded onto railroad cars at the proposed
9 Materials Recovery facility in Longview, and then shipped to the
10 landfill by train using the Company's existing railroad line.
11 Leachate collected at the landfill would be loaded onto the railroad
12 cars for transport to the Longview wastewater treatment plant.

13 VII

14 On November 14, 1984, the Cowlitz-Wahkiakum Governmental
15 conference adopted the Regional Solid Waste Management Plan ("Plan")
16 under Chapt. 70.95 RCW. Between December 10, 1984 and March 14, 1985
17 the respective counties and municipalities within the two counties
18 adopted the Plan.

19 On June 6, 1985 Ecology approved the Plan, finding:

20 [...]the plan generally fulfills the requirements of
21 the Solid Waste Management Act --- Recovery and
Recycling Act (chapter 70.95 RCW).

22 In addition to our approval, we also commend both
23 Cowlitz and Wahkiakum Counties, the cities and advisory
24 committees for their combined effort in preparing this
25 plan which successfully addresses a regional approach to
26 solid waste planning.

1 In 1988 the Plan was revised to address a change in approach to
2 handling municipal solid waste. Ecology approved the revision.

3 VIII

4 On April 27, 1990, Weyerhaeuser filed pre-applications with the
5 Health District for solid waste handling permits for the two
6 facilities.

7 The Health District, by May 31, 1990 memorandum, replied, stating
8 the facilities did not conform to the existing Plan and that a Plan
9 amendment would be needed before solid waste permits could issue.

10 Ecology took the same position in correspondence starting with a
11 letter of June 8, 1990.

12 On August 22, 1990, the District notified Weyerhaeuser that its
13 decision was final regarding Plan conformance, and informed the
14 Company of its right to directly appeal to the Pollution Control
15 Hearings Board.

16 IX

17 On September 18, 1990, Weyerhaeuser filed an appeal with the
18 Board, which became PCHB No. 90-165. Summary Judgment Motions
19 practice occurred.

20 CONCLUSIONS OF LAW

21 I

22 The legal issue in this Summary Judgment Motions practice is:

23 *Do the pre-applications conform with the*
24 *Cowlitz-Wahkiakum Solid Waste Handling Plan (aka*
Regional Solid Waste Management Plan)?

1 In answering that question, the 1985 Plan is the primary focus. The
2 1988 amendments did not deal with industrial or wood waste.

3 In determining this issue, we conclude that these phrases mean
4 the same: "in conformance with" in RCW 70.95.185 regarding DOE's
5 review of permit applications, and "not in conflict with" in RCW
6 70.95.190 for Health Departments' reviews of permit renewals. See
7 SANE v. Seattle, 101 Wn.2d 280 (1984).

8 II

9 The Department of Ecology determined in 1985 that the Plan met
10 the legal requirements then in existence. This Board declines the
11 Health District's invitation to determine the sufficiency of the
12 Cowlitz-Wahkiakum Solid Waste Handling Plan during this motions
13 practice. Our jurisdiction is directed at the propriety of this
14 permit. See RCW 43.21B.110; RCW 70.95.210.

15 III

16 Chapter 12 of the Plan is central to this case. It is entitled:
17 "Hazardous and Industrial Wastes." The Chapter is divided into three
18 sections: Hazardous Wastes, Nonhazardous Industrial Wastes, and Wood
19 Waste.

20 The nonhazardous industrial wastes section lists, at Table 12-3
21 the five major generators, all in the City of Longview (Cowlitz
22 County): Weyerhaeuser, Longview Fibre Company, International Paper,
23 Reynolds Metal and Reynolds Cable. The type and amount of wastes
24
25

1 generated are listed, as are the disposal sites. Weyerhaeuser is
2 acknowledged to be the largest generator. In 1984, it generated
3 approximately 432,600 tons annually. P. 12-17.

4 The Plan notes that:

5 *Most of the industrial wastes disposed of in the*
6 *region are disposed of on privately owned sites. Only*
7 *a small percentage of the waste dumped at the County*
8 *landfill is industrial waste. P. 12-17.*

9 The Plan recognizes that: "The wastes from smaller industries are not
10 monitored." P. 12-14.

11 There is no specific discussion of demolition or construction
12 waste, or of a materials recovery facility.

13 The Plan recognizes that DOE and industry are concerned that the
14 Radakovich landfill is nearing capacity. The Plan discusses potential
15 waste reduction/recycling efforts by Weyerhaeuser, but acknowledges
16 that the measures would not be implemented in time to significantly
17 extend the life of the Radakovich site. P. 12-20.

18 The nonhazardous industrial waste section concludes with this:

19 Recommendation:

20 The solution of this problem will be left to
21 private industry. Waste reduction and recycling should
22 be considered the preferred alternatives. The siting
23 of a new industrial waste landfill is also likely to be
24 required. P. 12-20; emphasis added.

25 IV

26 Chapter 12's next section deals with wood waste. Table 12-5

1 lists the major wood waste generators in the two counties, and again
2 Weyerhaeuser is the largest. The Plan states that Weyerhaeuser
3 produces 170,000 tons per year, "on and off-site operations
4 combined." P. 12-21.

5 The Plan concludes that "No major wood waste disposal problems
6 were identified." P. 12-25 lists the major wood waste generators in
7 the two counties, and again Weyerhaeuser produces 170,000 tons per
8 year, "on and off-site operations combined." P. 12-21.

9 The Plan concludes that: "No major wood waste disposal problems
10 were identified." P. 12-25. But the Plan also recognizes that wood
11 waste was being disposed of at unpermitted sites. The quantities "are
12 unknown and may not be significant." P. 12-25.

13 The Plan's recommendation for handling wood waste is:

14 Responsibility for proper disposal of wood wastes
15 will be left with private industry. The Health
16 District should contact generators of small amounts of
wood waste to determine if the wastes are being
properly disposed of. P. 12-27; emphasis added.

17 v

18 We conclude that to the extent Weyerhaeuser's proposed two
19 facilities will handle and dispose of nonhazardous industrial or wood
20 waste generated in Cowlitz or Wahkiakum Counties, the pre-application
21 proposals are in conformance with the Plan. The Plan's
22 Recommendations, at pages 12-20 and 12-27, make it clear that industry
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24
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1 in the two counties is to handle its solid waste. This is precisely
2 what Weyerhaeuser is proposing to do, in part.

3 The Cowlitz County Comprehensive Plan designation of
4 Forestry-Open Space is not inconsistent with the proposed landfill.

5 The Industrial-Heavy Manufacturing zoning classification is not
6 inconsistent with locating a Materials Recovery facility in Longview.

7 The Plan acknowledges that a new industrial waste landfill site
8 will likely be needed. The Plan, however, makes no effort to locate
9 this future site. Rather, when local government and Ecology adopted
10 the Plan, they delegated the solution to private industry. That
11 choice was clear and unambiguous; see the Plan Recommendations in
12 Conclusions III and IV, above.

13 There is no argument offered that either location is inconsistent
14 with either the local comprehensive land use plans or with zoning.
15 Site-specific analysis will likely be a part of future SEPA and
16 specific permit review processes.

17 VI

18 In so concluding, we do not find the lack of a specific
19 recitation for demolition or construction waste to be fatal to their
20 inclusion within the category "industrial waste". Clearly with its
21 large facilities, Weyerhaeuser has had such wastes as a normal part of
22 its industrial enterprise and has been disposing of them. We conclude
23 that demolition and construction wastes are necessarily within the
24 term "industrial waste" as that phrase is used in the 1985 Plan.

VII

Even though the Materials Recovery facility is not specifically listed or discussed in the Plan, we conclude this does not render it not in conformance. The Plan chose to have the Cowlitz-Wahkiakum area's industrial and wood waste handled by the private sector. The Materials Recovery facility is merely one means to handle those wastes, and as such need not be specifically listed or discussed under the approved Plan, so long as the facility only handles such wastes generated within these two counties.

VIII

Respondent Wilkins, et al. contend that the Cowlitz County Solid Waste Handling Plan has lapsed and is no longer valid because it has not been "reviewed and revised within five years of July 1, 1984. RCW 70.95.110(1)." Therefore, according to appellants, since an approved plan no longer exists, the Health District and Ecology are without authority to issue or approve solid waste permits, citing Noel v. Cole, 98 Wn.2d 375 (1982); Green v. Okanogan County, 60 Wash. 309 (1910). Respondents Health District, DOE and Amicus Thurston County did not join in this contention.

We do not agree with this contention for several reasons. As we stated earlier, the Board's focus is to determine the propriety of the permit. We also conclude that the Plan was reviewed and revised within five years of July 1, 1984. It was fully adopted by local

1 government by March 14, 1985 and by DOE on June 6, 1985. The 1985
2 Plan was revised in 1988 and approved by DOE.

3 Moreover, nothing in Chapt. 70.95 RCW suggests that the Plan
4 becomes void even if the governments have failed to review and revise
5 the Plan by the dates identified in RCW 70.95.110(1) and (2). When
6 the legislature elected to make activities void under the Act, it did
7 so explicitly, e.g. RCW 70.95.185(2). We decline to read such a
8 result into the statute.

9 IX

10 Respondent Gardner contends the Pollution Control Hearings Board
11 does not have jurisdiction over this appeal because Weyerhaeuser
12 should have first appealed to the Health District. We conclude this
13 contention is not correct.

14 The right to appeal to the Health District is Weyerhaeuser's
15 right. There is no suggestion in Chapt. 70.95 RCW that Weyerhaeuser
16 is mandated to appeal to the District first. Moreover, given the
17 District's statement in its August 22, 1990 letter that its decision
18 was "final", further appeals to the District would likely have been
19 futile. In that letter the District also stated that Weyerhaeuser
20 need not seek further review by the District, but could appeal
21 directly to this Board.

22 X

23 The pre-application proposals propose the importation of
24
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1 nonhazardous wastes from outside the two counties. Is such
2 importation in conformance with the Plan? In coming to our
3 conclusion, we necessarily read the Plan in its entirety, in the
4 context of the statute, Chapt. 75.95 RCW.

5 The Plan addressed the industrial and wood wastes generated
6 within the two counties, and estimated the waste volume. The Plan is
7 silent about importation, except for importation of a minor amount of
8 municipal waste. Pp. 7-20 and 8-10.

9 The Plan did not address importation. We conclude that
10 importation is not in conformance with the Plan as it is written. See
11 Eastmont Development Company, Inc. v. Snohomish Health District and
12 Snohomish County. (Before the Department of Ecology, ECY 86-01, April
13 30, 1987, attached to Ecology's Memorandum in Support.) We note that
14 nothing in the statute, Chapt. 75.95 RCW, precludes importation.

15 XI

16 While the Weyerhaeuser proposed facilities do, in part, conform
17 to the Plan, the proposed solid waste facilities will nonetheless have
18 to conform with the State of Washington Minimum Functional Standards,
19 and the State Environmental Policy Act ("SEPA"). These review
20 processes will involve extensive opportunity for local and state
21 input, and analysis of any potential environmental impacts.


22 In addition, it has not yet been determined whether a United
23 States Army Corps of Engineers Section 404 permit is needed. If such
24 permit were required, compliance with the federal National
25 Environmental Policy Act ("NEPA") would also be necessary.

1 ORDER

2 The Cowlitz-Wahkiakum Health District and the State of Washington
3 Department of Ecology's denials of Weyerhaeuser's pre-applications for
4 solid waste permits are REVERSED IN PART. The matter is REMANDED for
5 action consistent with this opinion.

6 DONE this 16th day of April, 1991.

7 POLLUTION CONTROL HEARINGS BOARD

8
9 
10 JUDITH A. BENDOR, Chair

11 
12 HAROLD S. ZIMMERMAN, Member

13 
14 ANNETTE S. MCGEE, Member